Supreme Court, U.S.
FILED

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No.

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased, Administratrix of the Estate of DAVID BARR, Deceased, a minor, and LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased

Petitioner

vs.

CITY OF PHILADELPHIA

Respondent

On Petition for Writ of Certiorari From the Supreme Court of Pennsylvania, No. 52 E.D. Appeal Docket 1995

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Following a wrongful death and survival action in which liability and a molded verdict was entered against the City of Philadelphia, the Supreme Court of Pennsylvania reversed the jury verdict by applying the provisions of the Recreational Use of Land and Water Act 68 P.S. S477-1 et seq. with those of the Political Subdivision Tort Claims Act 42 Pa. C.S. Section 8541 et. seq., conferring absolute immunity upon the City of Philadelphia. The Supreme Court's decision raised for the first time the federal questions presented herein. In so combining both Acts, is this judicial grant of absolute immunity violative of Petitioner's constitutional rights of due process and of equal protection, thereby rendering a result that is unconscionable and in contradiction to the modern trends of liability?

PARTIES TO THE PROCEEDING

Petitioner---Linda Lory, Administratrix of the Estate of Margaret Barr, Deceased, Administratrix of the Estate of David Barr, Deceased, a minor, and Linda Lory, Administratrix of the Estate of Margaret Barr, Deceased.

Respondent---City of Philadelphia.

Pursuant to Pa. R.C.P. 235, and U.S. Supreme Court Rule 28, the Attorney General of the Commonwealth of Pennsylvania has been given notice of this appeal.

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The opinion of the Supreme Court of Pennsylvania, Eastern District dated April 17, 1996 is reported at __ Pa. ____, __ A.2d _ (1996). (App. A, pg. 1a)

The opinion of the Commonwealth Court, after reargument, dated January 27, 1995 is reported at 901 C.D. 1993, 653 A.2d 1374 (1995) (App. B, pg. 14a).

The unreported opinion of the Commonwealth Court of Pennsylvania, dated July 13, 1994 is produced in Appendix C, pg. 44a) (Withdrawn pursuant to Order granting Reargument hearing by Court en banc and subsequently adopted. (App. C).

The unreported opinion of Judge Alfred J. DiBona, Jr. of the Court of Common Pleas of Philadelphia County, dated June 8, 1993 is produced in Appendix D, pg. 68a.

STATEMENT OF JURISDICTION

The Judgment of the Supreme Court of Pennsylvania was

entered on April 17, 1996 (App A, pg. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES AND PROCEDURAL RULES INVOLVED

The Recreational Use of Land and Water Act, in pertinent part, provides:

> Purpose; liability
> The purpose of this act is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their

liability toward persons entering thereon for such purposes.

68 P.S. Section 477-1

Liability not limited
Nothing in this act limits in any way any liability which otherwise exists:

(1) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(2) For injury suffered in any case where the owner of land charges the person or person who enter or go on the land for the recreational use thereof, except that in the case of land leased to the State or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

68 P.S. Section 477-6

The Political Subdivision Tort Claims Act, in pertinent part provides:

Governmental immunity generally

Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

42 Pa.C.S.A. Section 8541

Exceptions to governmental immunity
(a) Liability imposed. - A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in

this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitute a crime, actual fraud, actual malice or willful misconduct.

(b) Acts which may impose liability. - The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency....

(3) Real property. - The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency. As used in this paragraph, "real property" shall not include [ibid]:

> (i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
>
> (ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and

located within rights-of-way;
(iii) streets; or
(iv) sidewalks.

42 Pa.C.S.A. Section 8542(a)(b)

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and the
Associate Justices of the Supreme Court:

Philip J. Berg, on behalf of LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased, Administratrix of the Estate of DAVID BARR, Deceased, a minor, and LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased, Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

STATEMENT OF THE CASE

On June 12, 1983, teenager David Barr (decedent) drowned in a natural pond commonly known as Devil's Pool in Philadelphia's

Fairmount Park. The pool is formed by shear rock cliffs on three sides and by the confluence of the Cresheim and Wissahickon Creeks; it is a deceptively attractive and notorious swimming hole owned by the City of Philadelphia.

After fishing in Fairmount Park, Decedent Barr and a companion followed a pathway marked by color codes on the trees leading to Devil's Pool. At the site, there were no posted warnings, prohibitions, or safety devices. Decedent Barr proceeded to swim the length of the pool, to walk across a fallen log that had been in place for years, and to swim again, but this time to struggle and to submerge. Decedent's body was recovered on the sandy bottom of the pool.

On June 6, 1985, decedent's mother Margaret Barr filed suit against the City of Philadelphia averring negligence and willful misconduct with respect to the maintenance of Devil's Pool. On April 27, 1992, the jury, rendered a verdict that the City of Philadelphia was 55% negligent and that the decedent was 45% negligent with an award molded to reflect comparative negligence and delay damages totaling $660,915.79.

PENNSYLVANIA SUPREME COURT PROCEEDING:

Petition for allocator was filed and granted, thereby allowing the case to proceed to the Supreme Court of Pennsylvania. A decision was rendered on April 17, 1996, in which the court reversed the order of the Commonwealth Court and granted the City's motion for judgment N.O.V., invalidating the verdict of the jury in its entirety.

The majority concluded that, by interconnecting the provisions of the Recreation Act and the Tort Claims Act, the City had absolute immunity. The threshold by which the Recreation Act had imposed liability, specifically the willful or malicious failure to guard or warn against a dangerous condition, rendered the City immune within the Tort Claims Act.

Within a "constrained" concurring opinion, Mr. Justice Cappy expressed his "disdain for such a result and ...the harm and injustice that will follow from this decision" (App. A), leading to "the incredible result that even when it is aware of a dangerous and life threatening condition existing on its land, Appellant City is totally insulated from suit and owes no duty to citizens..."(App. A).

The Justice further explained the Court's original rationale in holding the Recreation Act applicable to the Commonwealth

maintaining "that the Commonwealth's exposure to suit should, at least be the same as that of a private citizen" (App. A), affording the citizen and the Commonwealth the same immunity status. But the interconnection of the Recreation and Tort Claims Acts results in a decision that grants "an immunity greater than that of a private citizen and in fact will enjoy immunity from suit...a bizarre and unjust outcome..." (App. A).

This Petition seeking Certiorari will have been filed on July 16, 1996.

PENNSYLVANIA COMMONWEALTH COURT PROCEEDING:

The City of Philadelphia appealed the order of the Court of Common Pleas to the Commonwealth Court of Pennsylvania. A three judge panel upheld all of the original findings except that of the admissibility of some of the prior swimming accidents. The panel reversed and remanded for a new trial on that basis.

Thereafter, applications for reargument were filed by the City of Philadelphia and by Decedent Barr's administratrix. By order of the Commonwealth Court, the decision and order previously entered were withdrawn and reargument was held on October 5, 1994 before the Court en banc. After further consideration, the

Court adopted the opinion of the three judge panel as the opinion of the Court en banc on January 27, 1995.

THE COURT OF COMMON PLEAS OF PHILADELPHIA PROCEEDING:

In response to the verdict entered against it, the City filed post verdict motions in the nature of judgments N.O.V. and motions for a new trial, both of which were denied on March 16, 1993. An Appeal was taken from this denial order and an opinion was filed on June 8, 1993 by the Honorable Judge Alfred DiBona, Jr.

In his review of the evidence, Judge DiBona opined that "the defendant had knowledge and notice of the dangerous condition of Devil's Pool," (App. D, pg. 68a); and that such willful conduct eliminated immunity available to the City under the Recreation Act. Additionally, the immunity provisions within the Political Subdivision Tort Claims Act were held inapplicable since the plaintiff "clearly had a cause of action at common law" (App. F, pg. 81a) and had met the burden of showing that the decedent's injury was caused in some manner by the unsafe condition of the defendant's real estate." (App. F)

In the review of the charge given to the jury it was determined that the jury had been provided with a "correct legal basis to guide the deliberation" (App. D). Further, the admission of evidence of prior accidents in substantially the same place and under similar circumstances to the Barr drowning" did not constitute error since the plaintiff had been "required to establish notice to defendant and knowledge of the defendant of the dangerous uses, activities and conditions of the area of the accident" (App. D). Accordingly, the post verdict motions had been properly denied and recorded as such via order on March 16, 1993.

REASONS FOR GRANTING THE WRIT

The decision in this case, by interconnecting the provisions of two separate and distinct acts, extends the applicability of immunity in excess of legislative intent and in direct conflict with the Constitutional rights of due process and equal protection. The Recreation Act (68 P.S. Section 477-1 et seq) grants immunity from tort actions to land owners permitting their property to be used for recreational purposes, with the exception of willful or malicious failure to guard or to warn; the Tort Claims Act (42 Pa. C.S. Section 8542(a)(2) imposes liability for, interalia, negligent

acts, but excludes acts of crime, fraud, or willful misconduct. The outcome of a combined reading grants absolute immunity, total insulation from suit to a governmental entity in circumstances in which the entity may have full knowledge of the dangerous uses and conditions on its property. The innocent victim of this condition is without recourse, deprived of all process and procedure. Such an expansion of immunity, unintended by the legislature and without rationale of state interest, leads to unconscionable results and is so far departed from constitutional principles of equal protection and of due process as to call for review by this Honorable Court.

Petitioner's constitutional claim rests upon the clauses of the 14th Amendment which states "[N]or shall any state deprive any person of life, liberty and property without due process of law." Nor deny to any person "...the equal protection of the laws." Petitioner has been denied both.

The most essential purpose of the due process clause is to provide a guarantee of fair procedures in connection with any deprivation. The clause was intended to prevent the government from abusing its powers or employing it as an instrument of oppression. Collins v. City of Harker Heights, Texas 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed. 2d 61 (1992); Davidson v.

Cannon 474 U.S. 344, 106 S.Ct. 668 (1986). In the instant matter, the decision granting total immunity is both abusive and oppressive.

In order to prevail on a due process claim, the petitioner must prove that there was a deprivation of a protected property interest and a denial of due process Logan v. Zimmerman Brush Company 455 U.S. 422, 102 S.Ct. 1148, 71 L. Ed. 2d 265 (1982). In the instant matter, the deprivation is the most serious of all - the loss of life - , and the denial of due process is the complete bar of all suits against a City that had full knowledge of the dangers on its land and failed to remedy the same.

To establish a claim based upon procedural due process, the focus is upon whether appropriate procedural safeguards have been provided. The constitutional duty to provide fair procedures gives the citizens the opportunity to try to prevent the deprivation from occurring, but the deprivation itself may not necessarily reflect any abuse of state power. The deprivation for example, may be the consequence of a mistake, and the state violation lies in the failure to provide appropriate procedural response. Daniels v. Williams v. Cannon 474 U.S. 327, 106 S. Ct. 677 (1986) concurring opinion of Justice Stevens. Petitioner herein has been deprived of a life and of any procedures by which to seek redress.

In order to challenge the validity of the stated procedures, there must be an objection, a demonstration of constitutional inadequacy, a defect so serious and so basic as to characterize the procedures as fundamentally unfair. In the instant matter, there are no procedures available by which the Petitioner can seek redress.

The interconnection of the two acts has conferred an unintended status of absolute immunity upon the City. The immunity provision of the Recreation Act, 68 P.S. Section 477-6, was to place the governmental entity on an equal footing with its citizen counterpart as well as to foster the use of natural land with liability imposed as to willful or malicious conduct. The Tort Claims Act, 42 Pa. C.S. Section 8541, set forth its provisions for intended immunity to preclude matters of individual intentional tort as distinct from negligence. By interconnecting the two, immunity parameters exceeds legislative intent and subvert the right to due process by eliminating all process. Such a defect is so serious and so fundamentally unfair in application and in result that it should not stand.

Although the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, there is an exception whereby the individual citizen is to be protected from state action. That is wholly arbitrary or irrational. USCA Const.

Amend. 14, 14 Section 1, Martinez v. State of Cal. 444 U.S. 277, 100 S.Ct. 553 (1980). States rules may be upheld if they rationally further policy that reasonable lawmakers may favor. Martinez, supra. But in the instant matter there is a blatant absence of any intended policy conferring absolute immunity and only through the rejection of this inadvertent status is the citizen to be protected from policy that is both arbitrary and irrational.

In addition to the violation of due process, the reading of the two acts results in decision making violative of equal protection. The immunity conferred upon the government herein is such an example. Even though immunity provisions within a statute involve social legislation and have a presumption of validity, the statutes are to be sustained only if the classification is rationally related to a legitimate state purpose. Schweiker v. Wilson 450 U.S. 221, 101 S.Ct. 1074, 67 L Ed.2d 186 (1981). No state purpose has been advanced herein.

The intent of the Recreation Act was directed toward the achievement of a legitimate state goal - the promotion of unimpeded use of natural areas by non owners. Rivera v. Philadelphia Theological Seminary of St. Charles Barromeo, Inc. 510 Pa. 1, 502 A.2d 1, Appeal after remand on other grounds 398

Pa. Super 264, 580 A.2d 1341 (1990), petition for allowance of appeal denied 527 Pa. 673, 594 A.2d 659 (1991). When the Pennsylvania Supreme Court held that the Act was applicable in its immunity provisions to the Commonwealth in Pennsylvania Department of Environmental Resources vs. Aureso 511 Pa. 73, 511 A.2d 815 (1986), the Court did so to make the Commonwealth's exposure to suit the same as that of a private citizen. In instances in which the private landowner was insulated from suit the Commonwealth was afforded the same immunity.

Similarly, the provisions of the Tort Claims Act, specifically those regarding immunity and exceptions were enacted in accordance with the statutory scheme as to the preservation of revenues and the powers of the agencies. 42 Pa. C.S. Section 8541 et seq. In regard to real estate, liability was imposed for negligence of the governmental entity with immunity extended for acts of crime, fraud and willful misconduct.

The interconnection of both immunity provisions does not further any rational purpose for it was not so intended. Although each act in and of itself is rationally related to legitimate state purpose, the combination exceeds the legislative intent. Further, no rational basis can exist in an inadvertent, unanticipated outcome. With this inability to pass the rational relation test, there

is clearly a violation of Petitioner's right of equal protection.

We recognize that certiorari is rarely granted, but in light of the violations of equal protection and due process in the instant matter, we pray for such relief.

CONCLUSION

The Petitioner for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A: OPINION OF THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT DATED APRIL 17, 1996.

[J-221-95]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased, Administratrix of the Estate DAVID BARR, Deceased, a minor, and LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased,	:	No. 52 E.D. Appeal Docket 1995
	:	Appeal from the order of the Commonwealth Ct. dated January 27, 1995, at No. 901 C.D. 1993, reversing in part the order of the Court of Common Pleas of Philadelphia County, dated March 16, 1993, at No. 2001 June Term 1985
Appellee	:	
v.	:	
CITY OF PHILADELPHIA	:	
Appellant	:	653 A.2d 1374 (Pa.Cmwlth. 1995)
	:	ARGUED: December 6, 1995

OPINION OF THE COURT

MR. JUSTICE FLAHERTY
April 17, 1996

DECIDED:

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Appendix A

This is an appeal by allowance from a decision of the Commonwealth Court which reversed an order of the Court of Common Pleas of Philadelphia County and granted a new trial in a wrongful death and survival action.

In 1983, a teenage boy, David Barr, drowned when he consumed alcohol and went swimming in Devil's Pool, a natural pond located in a remote and undeveloped portion of a park owned by the City of

Philadelphia. On numerous occasions signs had been posted at the pond to prohibit swimming. Vandals promptly removed the signs each time. On the day when Barr drowned, the signs were missing. The present action alleged that the city failed to take adequate measures to warn or guard against swimming in the pond. At trial, the city was found liable.

The Commonwealth Court reversed and remanded for a new trial on the basis that evidence of unrelated drownings in other ponds owned by the city had been erroneously admitted into evidence. The court rejected the argument, however, that a motion by the city for judgment n.o.v. should have been granted. At issue in the present appeal is whether the city was entitled to such a judgment on the ground that it was immune from liability under provisions of the Recreation Use of Land and Water Act (Recreation Act), 68 P.S. Section 477-1 et seq., and the Political Subdivision Tort Claims Act (Tort Claims Act), 42 Pa.C.S. Section 8541 et seq.

Appendix A

The Recreation Act was adopted "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." 68 P.S. Section 477-1. The act applies only to lands that are largely unimproved in character, and where no admission fee is charged. Mills v. Commonwealth, 534 Pa. 519, 524-26, 633 A.2d 1115, 1117-19 (1993); 68 P.S. Section 477-6(2). Both publicly owned and privately owned lands are covered by the act.

[J-221-95]-2

Walsh v. City of Philadelphia, 526 Pa. 227, 236-37, 585 A.2d 445, 449-50 (1991).

Limiting a landowner's duty of care, the Recreation Act provides:

> Except as specifically recognized or provided in section 6 of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

68 P.S. Section 477-3 (emphasis added) (footnote omitted). It also provides, in pertinent part:

> Except as specifically recognized by or provided in section 6 of this act, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:
>
> (1) Extend any assurance that the premises are safe for any purpose.

> (2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

68 P.S. Section 477-4 (footnote omitted). Thus, the landowner has no duty of care other than what is specified by section 6 of the act. Section 6 provides: "Nothing in this act limits in any way any liability which otherwise exists . . . [f]or wilful or malicious failure to guard or warn against a dangerous condition, use,

structure, or activity." 68 P.S. Section 477-6 (emphasis added). Therefore, the city's only liability to users of its undeveloped parkland was for "wilful or malicious" failure to guard or warn against dangers.

Although the city repeatedly placed signs to warn against swimming in the pond where Barr drowned, and the signs were each time removed by vandals, the city would nevertheless be liable under the Recreation Act if it acted willfully or maliciously in failure to guard or warn against dangers posed by the pond.

The Tort Claims Act, however, rendered the city immune from claims based on willful or malicious conduct. It waives governmental immunity only with respect to "negligent acts," and specifically declares that negligent acts do not include willful or malicious conduct:

> A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in

subsection (b):[1]

[J-221-95]-4

> (1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense [of immunity] . . . ; and
>
> (2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligence acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

42 Pa.C.S. Section 8542(a) (emphasis added).

A willful or malicious failure by the city to maintain signs warning of the danger of swimming in the pond cannot, therefore, be deemed

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[1]Subsection (b), 42 Pa. C.S. Section 8542(b), sets forth various acts for which liability can be imposed. The care, custody, and control of real property are, within limits specified in the statute, acts which can incur liability. 42 Pa.C.S. Section 8542(b)(3). In view of our disposition of this appeal on the primary issue presented, we do not reach the city's alternate contention that Barr was an undiscovered trespasser for whom immunity was not waived under 42 Pa.C.S. Section 8542(b)(3) which states that "the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency."

a "negligent act" under the Tort Claims Act.[2] To hold otherwise would be to ignore the plain language of the statute. In addition, it is well established that exceptions to the rule of absolute governmental immunity "must be narrowly interpreted given the express legislative intent to insulate political subdivisions

from tort liability." Mascaro vs. Youth Study Center, 514 Pa. 351, 361, 523 A.2d 1118, 1123 (1987). See also Kiley v. City of Philadelphia, 537 Pa. 502, 506, 645 A.2d 184, 185-86 (1994) (exceptions to governmental immunity must be "strictly construed.") Hence, the "negligent acts" for which immunity is waived cannot be deemed to include acts of malice and willful misconduct. The

---

[2]The distinction that the Tort Claims Act draws between acts of negligence and acts of malice or willful misconduct parallels established case law which treats these as separate and distinct grounds of liability. See Evans v. Philadelphia Transportation Authority, 418 Pa. 567,571-79, 212 A.2d 440,442-46 (1965) (negligence differs from willful or wanton misconduct); Geelen v. Pennsylvania Railroad Co., 400 Pa. 240, 248, 161 A.2d 595, 599-600 (1960); Turek v. Pennsylvania Railroad Co., 369 Pa. 341, 344-46, 85 A.2d 845, 847-48 (1952) (negligence distinguished from willful and wanton misconduct), cert. denied, 343 U.S. 928 (1952).

Commonwealth Court, in holding to the contrary, erred.

The order of the Commonwealth Court remanding for a new trial, and affirming the denial of the city's motion for judgment n.o.v., is reversed.

Mr. Chief Justice Nix files a concurring opinion.

Mr. Justice Cappy files a concurring opinion.

Judgment entered
Dated: April 17, 1996

/s/
Charles W. Johns, Esquire
Prothonotary

[J-221-95]-6

[J-221-95]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LINDA LORY, Administratrix of : No. 52 E.D. Appeal

F:\USERS\BAC\BARR.APP

Appendix A

the Estate of MARGARET BARR, Deceased, Administratrix of the Estate DAVID BARR, Deceased, a minor, and LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased,	:	Docket 1995
	:	Appeal from the order of the Commonwealth Court, dated January 27, 1995, at No. 901 C.D. 1993, reversing in part the order of the Court of Common Pleas of Philadelphia County, dated March 16, 1993, at No. 2001 June Term 1985
Appellee	:	
v.	:	
CITY OF PHILADELPHIA	:	
Appellant	:	653 A.2d 1374 (Pa.Cmwlth. 1995)
	:	ARGUED: December 6, 1995

CONCURRING OPINION

NIX, C.J.
DECIDED: April 17, 1996

Although I join the result reached by the majority, I must disassociate myself from the majority's reaffirmance of the proposition that the Recreation Use of Land and Water Act, 68 P.S. Section 477-1 to 477-8 ("RUA"), "applies only to lands that are largely unimproved in character . . . ." Slip op. at 2. I continue to adhere to the view that there is nothing in the language of the RUA that would suggest that it excludes improved land. See Walsh v. City of Philadelphia, 526 Pa. 227, 244, 585 A.2d 445, 453 (1991) (Nix, C.J., dissenting); Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.

Appendix A

510 Pa. 1, 27, 507 A.2d 1, 14 (1986) (Nix, C.J., dissenting).

[J-221-95]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased, Administratrix of the Estate of DAVID BARR, a minor, and LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased Appellee	:	No. 52 E.D. Appeal Docket Appeal from the order of the Commonwealth Court, dated January 27, 1995, at No. 901 C.D. 1993, reversing in part the order of the Court of Common Pleas of Philadelphia County, dated March 16, 1993, at No. 2001 June Term 1985 653 A.2d 1374
vs.	:	
CITY OF PHILADELPHIA Appellant	:	
	:	Argued: December 6, 1995

CONCURRING OPINION

MR. JUSTICE CAPPY: Decided: April 17, 1996

I am, constrained to join in the result reached by the Majority, as

I believe that it is required by the application of the Recreation Use of Land and Water Act (Recreation Act), 68 P.S. Section 477-1 et seq.,and the Political Subdivision Tort Claims Act (Tort Claims Act), 42 Pa.C.S.A. Section 8541 et seq., to this case. However, I write separately to express my disdain for such a result and to point out the harm and injustice that will follow from this decision.

The Majority correctly concludes that Appellee Lory's claim is barred by the immunity granted to Appellant City pursuant to the Recreation Act when read in pari materia with the Tort Claims Act.[1] Specifically, the Majority reasons that even if Appellant City is not deemed to be immune from suit under the Recreation Act because of Appellant City's willful or malicious failure to guard or warn against a dangerous condition, it is nonetheless immune under the Tort Claims Act. The Majority concludes that the Tort Claims Act's immunity for

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[1]The Recreation Act grants immunity from tort actions to landowners permitting their property to be used for recreational purposes. However, immunity is not granted for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. 69 P.S. Section 477-6. The Tort Claims Act imposes liability for, inter alia, negligent acts. However, for purposes of the Tort Claims Act, expressly excluded from the term negligent acts are acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct. 42 Pa.C.S.A. Section 8542(a)(2).

acts of willful misconduct[2] immunizes Appellant City against the Appellee's claim of a willful failure to guard or warn.[3]

I am compelled to agree that this is a proper reading of the Recreation Act and the Tort Claims Act. However, I am troubled by this application of the Recreation Act and the Tort Claims Act as this application of the Recreation Act and the Tort Claims Act as it leads to the incredible result that even when it is aware of a dangerous and life threatening condition existing on its land,

Appellant City is totally insulated from suit and owes no duty to citizens who enter lands covered by the Recreation Act.

I assume that where the Majority states on pages 4 and 6 of the Majority Opinion, that the Tort Claims Act renders the City immune from claims based on "willful or malicious conduct" it means the exceptions from the definition of negligent acts, e.g., acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

[3]Thus, the Majority, without explicitly stating so, rejects the Commonwealth Court's distinction between a willful failure to guard or warn under the Recreation Act and willful misconduct under the Tort Claims Act. Indeed, the Majority implicitly states that willful misconduct includes a willful failure to guard or warn.

Appendix A

When this Court held that the Recreation Act was applicable to the Commonwealth in Pennsylvania Department of Environmental Resources v. Auresto, 511 Pa. 73, 511 A.2d 815 (1986), we did so because it was clear that the Commonwealth's exposure to suit should, at least, be the same as that of a private citizen.[4] Thus, because a private citizen was protected from suit like that in Auresto, the Commonwealth was properly and justly afforded the same immunity. After the decision in the case sub judice however, the Commonwealth will enjoy an immunity greater than that of a private citizen and in fact will enjoy absolute immunity from suit with respect to lands subject to the Recreation Act.

The bizarre and unjust outcome of this reading of the Recreation Act and the Tort Claims Act is that Appellant City may be fully aware of, in essence, a death trap on City property which is subject to the Recreation Act, fail or refuse to remove the deadly condition, fail or refuse to guard the deadly, or fail or refuse to warn of the deadly condition, and yet remain absolutely immune from any action filed by an innocent victim of this condition.

The absurdity of this result is evidenced by the contorted reasoning employed by the Commonwealth Court to reach a just

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[4]Our Auresto decision dealt with the Sovereign Immunity Act, 42 Pa.C.S.A. Section 8501 et seq., as opposed to the Tort Claims Act. However, for present purposes, the difference between the Acts is inconsequential.

[J-221-95] - 3

outcome. Although I cannot adopt the Commonwealth Court's reasoning, I certainly understand the Commonwealth Court's ingenious attempt to inject a sense of fairness into the case. While I ultimately conclude that the distinction between a willful failure to guard or warn and willful misconduct in insupportable, the absolute immunity of Appellant City with respect to lands covered by the Recreation Act is simply unconscionable and not in accord with modern trends of liability.

[J-221-95] - 4

Appendix B

APPENDIX B: OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED JANUARY 27, 1995.

IN THE COMMONWEALTH OF PENNSYLVANIA

MARGARET BARR, Administratrix of the Estate of David Barr, Deceased, a minor, and MARGARET BARR, in her own right	:	NO. 901 C.D. 1993
v.	:	Reargued: October 5, 1994
CITY AND COUNTY OF PHILADELPHIA	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE SANDRA SCHULTZ NEWMAN, Judge

OPINION BY PRESIDENT JUDGE COLINS FILED: January 27, 1995

This matter was initially argued before a three-judge panel of this Court January 31, 1994, and an opinion and order were filed on July 13, 1994. Applications for reargument were filed by appellant, City

of Philadelphia, and appellee, Margaret Barr. By order of this Court dated September 19, 1994, the decision and order previously entered were withdrawn, and reargument was granted and held on October 5, 1994 before the Court en banc. After further consideration, the Court adopts the original opinion of the three-judge panel as the opinion of the Court en banc. Said opinion follows.

The City of Philadelphia (City) appeals a March 16, 1993 order of the Court of Common Pleas of Philadelphia County (Common Pleas) denying the City's motions for judgment n.o.v. and for a new trial (post-verdict motions). We reverse and remand.

On June 12, 1983, David Barr (decedent) drowned in what is commonly known as Devil's Pool,[1] a natural body of water in the City's Fairmount Park. On June 6, 1985, Margaret Barr (administratrix), decedent's mother, filed suit against the City averring negligence and willful misconduct with respect to the City's maintenance of Devil's Pool.[2] On April 27, 1992, a jury determined that the City was 55% negligent and that the decedent was 45% negligent. The jury awarded $100,000.00 in the wrongful death action

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[1]Devil's Pool is formed by the confluence of the Cresheim and Wissahickon creeks and has shear rock cliffs on three sides.

[2]The City does not dispute the fact that it is the landowner and possessor of Devil's Pool.

and $600,000.00 in the survival action; both amounts were molded by Common Pleas to reflect the comparative negligence of the parties. Additionally, the verdict was again molded to reflect the addition of delay damages in the amount of $275,915.79, for a total verdict of $660,915.79. The City's post verdict motions were subsequently denied. The instant appeal followed.

The City argues first, that pursuant to Section 3 of what is commonly known as the Recreational Use of Land and Water Act (Recreation Act),[3] as landowner and possessor of Devil's Pool, it is immune from any claims of negligence arising from decedent's recreational use of the water. Hence, Common Pleas erred in permitting the jury to consider administratrix's negligence claims against the City and in denying the City's corresponding motion for

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[3]Act of February 2, 1966, P.L. (1965) 1860, 68 P.S. Section 477-3, which provides:

> Except as specifically recognized or provided in section 6 of this act[, 68 P.S. Section 477-6], an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

judgment n.o.v. The City argues second, that pursuant to Section 8542(a) of the Judicial Code (Code),[4] it is immune from any claims of willful misconduct arising from decedent's drowning. Hence, Common Pleas erred in permitting the jury to consider administratrix's willful misconduct claims against the City and in denying the City's

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[4]42 Pa. C.S. Section 8542(a) provides:

A local agency shall be liable for damages on account of an injury to a person of property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under Section 8546 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, 'negligent acts' shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

motion for judgment n.o.v. The City argues third, that pursuant to Section 8542(b)(3) of the Code,[5] the real property exception to governmental immunity, Common Pleas erred in refusing to charge the jury that the City could not be held liable if decedent were found to be a trespasser. Hence, Common Pleas erred in denying the City's motion for new trial. The City argues fourth, that Common Pleas

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[5]42 Pa. C.S. Section 8542(b)(3) provides:

> (b) Acts which may impose liability. The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
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> ...
>
> (3) Real property. The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of he local agency. As used in this paragraph, 'real property' shall not include:
> (i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
> (ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;
> (iii) streets; or
> (iv) sidewalks.

erred in allowing administratrix to present allegedly prejudicial, irrelevant evidence or prior swimming accidents within Fairmount Park but not at Devil's Pool. In addition, Common Pleas compounded this error by denying the City's motion for a new trial.

Administratrix argues first, that pursuant to Section 6 of the Recreation Act, 68 P.S. Section 477-6,[6] and Section 342 of the Restatement (Second) of Tort (Section 342),[7] and because the City

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[6]68 P.S. Section 477-6 provides:

> Nothing in this act limits in any way any liability which otherwise exists:
> (1) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.
> (2) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for recreational use thereof, except that in the case of a land leased to the State or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of its [sic] section.

[7]Restatement (Second) of Torts Section 342 (1964) provides:

> Section 342. Dangerous Conditions Known to Trespassers
>
> A possessor of land is subject to liability for physical harm caused to licensees by a condition of the land, if, but only if,

had extensive, prior knowledge of the obscure, dangerous conditions in Devil's Pool but failed to take any meaningful, curative measures with respect thereto, the City cannot be relieved of liability. The City willfully failed to warn or guard against the obscure, dangerous conditions within Devil's Pool. Under the circumstances, therefore, the City's conduct clearly fails within the purview of Section 342, and as such, the City's conduct invokes the willful or malicious failure to warn or guard exception of Section 6 of the Recreation Act. Administratrix argues second, that because she presented evidence at trial which clearly showed that the City had knowledge of dangerous activities in and around Devil's Pool and because decedent's death was caused in some manner by an unsafe, defective condition of the real estate itself, the Code's real property exception to governmental immunity operates to impose tort liability on the City. Administratrix

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(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

argues third, that because Fairmount Park is open to the public and because a trial court has wide latitude in charging a jury, Common Pleas did not err in refusing to charge the jury that the City could not be found liable if decedent were found to be a trespasser. Alternatively, pursuant to Section 336 of the Restatement (Second) of Tort,[8] even if decedent were found to be a trespasser, the City is liable. Therefore, the City's claim that under the circumstances, the Code's real property exception insulates it from liability with respect to trespassers is erroneous. Administratrix argues fourth, that Common Pleas properly admitted evidence of prior swimming accidents near, albeit not at Devil's Pool, as this evidence was relevant to show that the City did, in fact, have knowledge of similar dangerous conditions both in Devil's Pool and in other nearby natural bodies of water. This evidence was relevant to demonstrate the City's general awareness of the dangerous nature of the area's natural bodies

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[8]Restatement (Second) of Torts Section 336 (1964) provides:

Section 336. Activities Dangerous to Known Trespassers

A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety.

of water and hence, is essential to establish exceptions to both the Recreation Act's and the code's general imposition of landowner immunity and governmental immunity respectively.

The issues presented on appeal are: (1) considering that the Recreation Act provides for landowner immunity with respect to negligence claims, whether Common Pleas erred by not granting the City's motion for judgment n.o.v.; (2) considering that the Code provides for governmental immunity as to willful misconduct claims, whether Common Pleas erred by not granting the City's motion for judgment n.o.v.; (3) because Common Pleas did not charge the jury that the City was immune from liability pursuant to the real property exemption with respect to trespassers, whether Common Pleas erred by not granting the City's Motion for a new trial; (4) because Common Pleas permitted the jury to hear and consider evidence of prior, allegedly unrelated drownings in other natural bodies of water near Devil's Pool, whether Common Pleas erred or abused its discretion by not granting the City's motion for a new trial.

The Court's "scope of review of a trial court's decision denying motions for judgment n.o.v. or for a new trial is limited to determining whether the trial court abused its discretion or committed an error of law." United Stated Fidelity & Guaranty Company v. Royer Garden Center & Greenhouse, Inc., 143 Pa. Commonwealth Ct. 31, 40, 598 A.2d 583, 587 (1991), petition for allowance of

appeal denied, 530 Pa. 663, 609 A.2d 170 (1992).

I. Applicability of the Recreation Act's Exception to Landowner Immunity

A succinct analysis of the Recreation Act is imperative in reaching a determination of the aforementioned issues. The purpose of the Recreation Act is "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." Section 1 of the Recreation Act, 68 P.S. Section 477-1. Section 3 of the Recreation Act, 68 P.S. Section 477.3, provides that owners of recreational land do not owe a duty of care to keep their premises safe for recreational use by others, and Section 4 of the Recreation Act, 68 P.S. Section 477.4, provides that said owners do not incur liability for injury to such persons, unless the owners willfully or maliciously fail "to guard or warn against a dangerous condition, use, structure or activity." Section 6 of the Recreation Act, 68 P.S. Section 477-6.

The Pennsylvania Supreme Court has stated that the legislature intended to "limit applicability of the [Recreation Act] to outdoor recreation on largely unimproved land...." Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 510 Pa. 1, 16, 507 A.2d 1, 8 (1986), appeal after remand on other grounds, 398 Pa. Superior Ct. 264, 580 A.2d 1341 (1990), petition for allowance of appeal denied, 527 Pa. 623, 594 A.2d 659 (1991). The courts have

extended immunity under the Recreation Act to public as well as private owners. Commonwealth v. Auresto, 511 Pa. 73, 511 A.2d 815 (1986) (immunity pursuant to the Recreation Act extends to the Commonwealth); Farley v. Township of Upper Darby, 100 Pa. Commonwealth Ct. 535, 514 A.2d 1023 (1986), petition for allowance of appeal denied, 517 Pa. 611, 536 A.2d 1334 (1987) (immunity pursuant to the Recreation Act extends to local government landowners). In addition, the Supreme Court has stated that it would be inconsistent with present public policy trends [ibid] to extend the Recreation Act to provide blanket immunity to all government owned and operated recreational facilities. Walsh v. City of Philadelphia, 526 Pa. 227, 585 A.2d 445 (1991). Section 3 of the Recreation Act provides that a landowner is entitled to immunity when the landowner did not willfully or maliciously fail "to guard or warn against a dangerous condition, use, structure, or activity[]" on the land, when the landowner did not charge for the recreational use of the land, or when the injured party entered the land for recreational purposes.

Initially, it must be determined whether Devil's Pool is the type of recreational facility which the legislature intended to fall within the scope of the Recreation Act. As the undeveloped, unimproved area in and around Devil's Pool is open to the public free of charge, and as this same area is used for a myriad of recreational purposes, such as fishing, hiking, picnicking, and swimming, the land in and around

Devil's Pool certainly appears to fall within the purview of the Recreation Act.

Section 6 of the Recreation Act provides an exception to the immunity conferred in Section 3 of that act, but the exception applies only to the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. With respect to the instant case, the question becomes whether the City willfully or maliciously failed to warn or guard against the dangerous condition, use, or structure of Devil's Pool.[9]

The Pennsylvania Superior Court has held:

> Although neither our Supreme Court nor this Court has interpreted [68 P.S.] Section 477-6, in Hahn v. Commonwealth, 18 Pa.D & C 3d 260 (1980), the court of common pleas equated the [68 P.S.] Section 477-6 standard of 'wilful and malicious' misconduct to the standard owing to gratuitous licensee at common law, that is, liability for willful or wanton injury. A gratuitous licensee is a person who is permitted, expressly or impliedly, to enter upon the land of another solely for the licensee's own accommodation, benefit, or convenience, and not for the owners's benefit or interest. Because the [Recreation] Act concerns situations analogous to that of the gratuitous licensee, that is, landowners permitting free access to their property to the public for the public's

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[9]The record reveals that there is no dispute that the City had actual knowledge of the prior drownings and swimming accidents and that there were no signs posted indicating that swimming could be dangerous.

> recreational pursuits and not for the benefit of the landowner, we agree with the Hahn court that the [Recreation] Act's 'wilful and malicious' standard represents a codification of the standard of care owing to a gratuitous licensee at common law...
>
> In defining the wilful and wanton standard applicable in cases involving gratuitous licensees, Pennsylvania decisional law has relied on the Restatement (Second) of Torts provision regarding the duty owed to licensees....

Baran v. Pagnotti Enterprises, Inc., 402 Pa. Superior Ct. 298, 302-03, 586 A.2d 978, 980-81 (1991) (footnote omitted) (citations omitted). The Pagnotti court then quotes Section 342 of the Restatement (Second) of Torts, entitled "Dangerous Conditions Known to Possessor."[10]

In arguing that the willful or malicious failure to warn or guard exception of Section 6 of the Recreation Act applies, administratrix provided uncontradicted evidence that the City was fully aware that Devil's Pool was a popular, public swimming hole, that there had been previous drownings and swimming accidents in Devil's Pool, that both immediately prior to and at the time of decedent's death there were no warning signs posted at Devil's Pool relating the danger of swimming therein, that the water in Devil's Pool was not clear, thereby preventing one from seeing far below the surface, that one could enter the water by climbing down rocks which projected

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[10]See footnote 7, supra.

outward beneath the water line,[11] and that the City did not have any type of lifesaving equipment on the premises. Further, administratrix presented expert testimony that reasonable, curative measures could have feasibly been taken, such as affixing permanent signs relating the danger of swimming therein, fencing off the area, or making regular, routine patrols of the area.

Finally, the United States District Court for the Eastern District of Pennsylvania has recently held that the exception to immunity conferred by the Recreation Act when a landowner's failure to guard against a dangerous condition is willful involves two elements: (1) Actual knowledge of a danger, that is (2) not obvious to those entering the premises. Flohr v. Pennsylvania Power & Light Company, 821 F. Supp. 301 (E.D.Pa. 1993). Accordingly, with respect to the evidence which administratrix presented regarding both the City's knowledge of the dangers in and around Devil's Pool and the obscure, dangerous conditions thereabouts, the City's behavior was not prudent. The willful or malicious failure to guard or warn exception of Section 6 of the Recreation Act, therefore, operates to impose liability upon the City in connection with decedent's death if administratrix is able to clear the obstacles presented by the Code's real property exception to governmental immunity.

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[11]With respect to the rock configuration at Devil's Pool, see footnote 1, supra.

Appendix B

II. Applicability of the Code's Real Estate Exception to Governmental Immunity

Initially, it must be noted that the immunity provisions set forth in the Recreation Act generally must be read in pari materia with the immunity provision set forth in the Code. Auresto. With respect to whether the real property exception operates to impose liability on the City and with respect to administratrix's willful failure to warn or guard averments, the Pennsylvania Supreme Court has held

> that the real estate exception [to governmental immunity] can be applied only to those cases where it is alleged that the artificial condition of defect of the land itself causes the injury, not merely when it facilitates the injury by the acts of others, whose acts are outside the statute's scope of liability.

Mascaro v. Youth Study Center, 514 Pa. 351, 363, 523 A.2d 1118, 1124 (1987). In addition, this Court has held that

> Mascaro and the subsequent line of cases interpreting it are clear that the injury must result from a defect in the real property itself, that the defect must be the direct cause of the injury, and that intervening acts serve to render the real property exception inapplicable....

Downing v. Philadelphia Housing Authority, 148 Pa. Commonwealth Ct. 225, 232, 610 A.2d 535, 538, petition for allowance of appeal denied, 532 Pa. 658, 615 A.2d 1314 (1992). "[T]he burden [is] on [administratrix] to prove that the real estate itself was defective and that the real estate's defect caused the injuries, not merely the

negligence of the City employees." Mitchell v. City of Philadelphia, 141 Pa. Commonwealth Ct. 695, 701, 596 A.2d 1205, 1208 (1991).

Administratrix has argued both in her brief and vigorously at oral argument, that the obscure, dangerous defects within Devil's Pool itself directly caused decedent's death. There is no evidence of record, however, of any specific defect which caused decedent's drowning except for the direct testimony of Philadelphia police officer David Gallus.[12] Officer Gallus testified that one could directly enter the water by climbing down rocks, the desired inference being that there were rocks projecting outward beneath the water line. Thus Court notes that the administratrix also introduced the testimony of two other experts at trial: Carl A. Silver, Ph. D. (Dr. Silver), a professor of human engineering and statistics at Drexel University, and William Logue (Coach Logue), an aquatic consultant and former men's and women's swimming and diving coach at Drexel University. Dr. Silver testified during cross-examination that he could only speculate as to whether decedent was injured by any obstacle in Devil's Pool. Similarly, Coach Logue testified during cross-examination that he could only speculate as to what may have caused

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[12]AT the time of decedent's death, Officer Gallus held the rank of police diver; Officer Gallus recovered decedent's body from Devil's Pool.

decedent to drown in Devil's Pool.[13]

In addition, there was no evidence of trauma introduced at trial. Officer Gallus further testified that when he recovered decedent's body from Devil's Pool, he did not observe any evidence of trauma to the body. Moreover, the medical evidence indicated death by drowning. The Medical Examiner's report (report) was admitted into evidence as plaintiff's exhibit No. P-17. The "REPORT OF DEATH" section of the report provides the following: "Decedent was in [the] Park drinking, he jump [sic] from a bridge into [Devil's Pool], decedent drowned, no apparent trauma." In the "POSTMORTEM REPORT" section, under "PATHOLOGICAL DIAGNOSIS," the report states that decedent was suffering from the effects of ethanolism;[14] under "EXTERNAL EVIDENCE OF INJURY," the report states that there was no apparent trauma except for extremely superficial abrasions of the lips, eyelids, and nose; under "INTERNAL EXAMINATION," the

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[13]Mr. Logue opined that several factors may have contributed to decedent's drowning: rapid change in the depth of the water; disorientation with respect to the surface due to the murkiness of the water; and sudden change in body temperature because of the frigid temperature of Devil's Pool.

[14]Ethanolism indicates an ethanol induced abnormally diminished content of glucose in the blood.

report states that "[c]raniocerebral or myelocervical injuries are not present." Finally, in the "REPORT OF TOXICOLOGIST" section, the report indicates that the decedent had been drinking and had a stomach alcohol content of 0.62%, a blood alcohol content of 0.09%, and a urine alcohol content of 0.11%.

While administratrix vigorously argues causation issues in her brief, the causation issue was never raised by the City, the burdened party, on appeal to this Court. Specifically, the City did not raise the issue of whether the real estate was defective or whether there was a lack of evidence that such defects caused decedent's drowning. This Court cannot raise these issues sua sponte. We must limit ourselves to the issues preserved in the City's brief. Pa. R.A.P. 2116.[15]

The City contends, with regard to governmental immunity, that if this Court concludes (as we have) that the willful or malicious failure to warn or guard exception of Section 6 of the Recreation Act removes the Recreation Act's bar to suit, the administratrix cannot recover, because the real estate exception to governmental immunity provides that a governmental entity cannot be held responsible for willful

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[15]Pa. R.A.P. 2116 provides, in pertinent part:

> The statement of the questions involved must state the question or questions in the briefest and most general terms.... [N]o point will be considered which is not set forth in the statement of questions involved or suggested thereby.

misconduct. In essence, the City would have us declare that "willful or malicious failure to warn or guard" is synonymous with "willful misconduct." We cannot so hold. Willful denotes an act of commission, requiring proof "that the actor [affirmatively] desired to bring about the result that followed, or at least [knew that] it was substantially certain to follow." Diaz v. Houck, 159 Pa. Commonwealth Ct. 274, 283-4, 632 A.2d 1081, 1085 (1993). On the other hand, a willful failure to guard or warn denotes an actor's failure to act or an intentional omission rather than an actor's intentional desire to harm, kill, or maim.

Accordingly, we hold that Common Pleas did not err in the treatment of these issues or in its refusal to grant judgment n.o.v. based upon the Recreation Actor the Code.

III. Propriety of Common Pleas' Refusal to Give Trespass Charge

"'So long as the trial court properly covers the law on the issues raised in the case, [the trial judge] is given wide latitude in charging the jury.'" City of Philadelphia v. Duda, 141 Pa. Commonwealth Ct. 88, 99, 595 A.2d 206, 211 (1991), petition for allowance of appeal denied, 532 Pa. 658, 615 A.2d 1314 (1992) (quoting Sheehan v. Cincinnati Shaper Company, 382 Pa. Superior Ct. 579, 586, 555 A.2d 1352, 1356, petition for allowance of appeal denied, 523 Pa. 633, 564

A.2d 1261 (1989)). In addition, this Court has held that in reviewing jury instructions "[a] review of the entire charge is necessary to determine whether the trial court erred." Eckert v. Querry, 158 Pa. Commonwealth Ct. 421, 426, 632 A.2d 9, 11 (1993). Further, "[a] court's charge to the jury will be upheld if it adequately and accurately reflects the law and was sufficient to guide the jury in its deliberation.'" Brill v. Systems Resources, Inc., 405 Pa. Superior Ct. 603, 606, 592 A.2d 1377, 1378 (1991) (quoting Commonwealth v. Person, 345 Pa. Superior Ct. 341, 345, 498 A.2d 432, 434 (1985)).

Devil's Pool is within the confines of Fairmount Park, one of the largest public municipal parks in the country. The record reveals no evidence that decedent intentionally trespassed. Moreover, all of the evidence presented shows that at the time of decedent's death there were no signs or warnings relating the danger of swimming in Devil's Pool or indicating that it was off limits to the public. The park is a public recreation area frequented every year by thousands of citizens who engage in a myriad of recreational activities.

The City has admitted that there were no warning signs or trespass notices present at Devil's Pool at the time of decedent's drowning. It follows ipse dixit that decedent could not have been found to have been a trespasser based upon the evidence presented to the jury. Therefore, this Court holds that Common Pleas did not err in refusing to charge the jury on trespassing, because there was no evidence that decedent trespassed; Common Pleas' charge adequately and accurately

reflected the pertinent law.

IV. Admissibility of Evidence Regarding Prior Swimming Accidents Near Devil's Pool

"The fundamental consideration in determining the admissibility of evidence is whether that evidence is relevant to the fact sought to be proved." Starr v. Department of Environmental Resources, 147 Pa. Commonwealth Ct. 196, 203, 607 A.2d 321, 324 (1992). "Evidence is relevant if it tends to establish facts in issue." Monaci v. Workmen's Compensation Appeal Board (Ward Trucking), 116 Pa. Commonwealth Ct. 172, 175, 541 A.2d 60, 62 (1988). "However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion. Prejudice refers to an undue tendency to suggest a decision on an improper basis and does not refer to merely being detrimental to one party's case." Morrison v. Commonwealth, 148 Pa. Commonwealth Ct. 245, 252-53, 610 A.2d 1082, 1086 (1992), rev'd on other grounds, __Pa.__, 646 A.2d 565 (1994) (citation omitted.) Generally, remoteness of evidence is determinable by distance as well as time. Finnerty v. Darby, 391 Pa. 300, 138 A.2d 117 (1958). If the other nearby natural bodies of water where similar accidents occurred are so remote in space/distance from Devil's Pool that they are without probative value, then such evidence will be excluded on

the independent ground of irrelevancy. See Commonwealth v. Scott, 496 Pa. 78, 436 A.2d 161 (1981); Gibson v. Department of Public Welfare, 35 Pa. Commonwealth Ct. 27, 384 A.2d 1030 (1978).

This Court holds that Common Pleas erred, when it admitted evidence of prior swimming accidents that did not occur at Devil's Pool, because there was no evidence to demonstrate that the attending circumstances and conditions were similar to those at Devil's Pool when decedent drowned. Moreover, the physical remoteness between the other natural bodies of water where prior swimming accidents occurred and Devil's Pool where the decedent's drowning occurred substantially diminishes any probative value of demonstrating analogous conditions and circumstances. See Commonwealth v. Clark, 280 Pa. Superior Ct. 1, 421 A.2d 374 (1980), affirmed, 501 Pa. 393, 461 A.2d 794 (1983).

This Court acknowledges that the decision "[w]hether to grant a motion for a new trial is within the discretion of the trial court and its decision will not be reversed in the absence of a manifest abuse of discretion or a clear error of law." Bucks County Water v. 9.180 Feet of Land, 147 Pa. Commonwealth Ct. 612, 617-18, 608 A.2d 1109, 1112 (1992). In conjunction therewith, "some improperly admitted evidence may be so prejudicial that a new trial is required." Scranton Penn Furniture Company v. City of Scranton, 92 Pa. Commonwealth Ct. 45, 52, 498 A.2d 469, 473 (1985). This Court agrees with the City that a new trial should be granted, because

evidence of prior, unrelated drownings and swimming accidents near to but not at Devil's Pool cannot provide probative evidence regarding the cause of decedent's death at Devil's Pool, and such evidence was highly inflammatory.

Accordingly, we reverse Common Pleas on its determination that evidence of prior, unrelated swimming accidents was admissible; we affirm Common Pleas in all other respects, and we remand for a new trial consistent with this opinion.

JAMES GARDNER COLINS, Judge

IN THE COMMONWEALTH OF PENNSYLVANIA

MARGARET BARR, Administratrix of the Estate of David Barr, Deceased, a minor, and MARGARET BARR, in her own right	:	NO. 901 C.D. 1993
v.	:	
CITY AND COUNTY OF PHILADELPHIA, Appellants	:	

ORDER

AND NOW, this 27th day of January, 1995, the order of the

Appendix B

Common Pleas Court of Philadelphia County in the above-captioned matter is reversed and this matter is remanded for a new trial consistent with the foregoing opinion.

Jurisdiction relinquished.

JAMES GARDNER COLINS,
President Judge

IN THE COMMONWEALTH OF PENNSYLVANIA

MARGARET BARR, Administratrix of the Estate of David Barr, Deceased, a minor, and MARGARET BARR, in her own right	:	NO. 901 C.D. 1993
v.	:	
CITY AND COUNTY OF PHILADELPHIA	:	Reargued: October 5, 1994

BEFORE: HONORABLE JAMES GARDNER COLINS,
President Judge
HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DORIS A. SMITH, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE SANDRA SCHULTZ NEWMAN, Judge

Appendix B

DISSENTING OPINION
BY JUDGE McGINLEY FILED: JANUARY 27, 1995

I respectfully dissent to the majority's conclusion that the trial court did not err in its refusal to grant the City's motion for judgment n.o.v. I believe that "willful or malicious failure to guard or warn" is synonymous with "willful misconduct" and therefore disagree with the majority's conclusion that Section 8542(a) of the Judicial Code (Code), 42 Pa. C.S. Section 8542(a), does not bar suit in the present matter against the City

Section 3 of the Recreational Use of Land and Water Act (Recreation Act),[1] 68 P.S. Section 477-3, provides:

> Except as specifically recognized or provided in section 6 of this act, [68 P.S. Section 477-6], an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure or activity on such premises to person entering for such purposes. (Emphasis added.)

Section 6 of the Recreation Act, 68 P.S. Section 477-6, states that owners will not incur liability for injury to persons entering their land for recreational purposes unless the owner willfully or maliciously fails "to guard or warn against a dangerous condition, use structure, or activity." the majority concludes, and I agree, that the City is

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[1]Act of February 2, 1966, P.L. (1965) 1860, 68 P.S. Section 477-1 - 477-8.

liable under the Recreation Act because the evidence supports a finding that they willfully or maliciously failed to warn or guard against the dangerous conditions of Devil's Pool. However, as noted by the majority, the immunity provision of the Recreation Act must be read in pari materia with the immunity provision of the Code. Majority Opinion at 13. (Citation omitted.)

Pursuant to the Code a local agency will be liable for injury to a person only if "the injury was caused by the negligent acts of the local agency or an employee thereof....." 42 Pa. C.S. Section 8542(a)(2) (Emphasis added.) "Willful misconduct" does not constitute a "negligent act" for purposes of this section of the Code. Id. Thus, the question of whether the City is immune from suit hinges upon whether the City's "willful or malicious failure to guard or warn" is considered a "negligent act" or "willful misconduct".

The majority attempts to distinguish "willful or malicious failure to guard or warn" from "willful misconduct" by assigning to each phrase a different state of mind.

> Willful denotes an act of commission, requiring proof "that the actor [affirmatively] desired to bring about the result that followed, or at least [knew that] it was substantially certain to follow." (Citation omitted.) On the other hand, a willful failure to guard or warn denotes an actor's failure to act or an intentional omission rather than an actor's intentional desire to harm, kill or maim.

Majority opinion at 17. The implication of the majority's interpretation is that one who willfully fails to guard or warn of a dangerous condition has not desire to bring about harm, or no knowledge that harm is substantially certain to be in the result of his/her inaction. With this distinction I do not agree. Further, the majority's own analysis does not support this conclusion.

In determining that the City is liable under the Recreation Act, the majority relies on a Superior Court case which equates the standard of "willful or malicious failure to guard or warn" to the standard owing to gratuitous licensees at common law, that being, liability for willful or wanton injury. Majority opinion at 11 (citing Baran v. Pagnotti Enterprises, Inc. 402 Pa Superior Ct 298, 302-03, 586 A.2d 978, 980-81 (1991) The Superior Court states that Section 342 of the Restatement (Second) of Torts, entitled "Dangerous Conditions Known to Possessor" should be relied upon "[i]n defining the willful and wanton standard applicable in the cases involving gratuitous licensees." Id. Restatement (Second) of Torts Section 342 (1964) provides:

> Section 342. Dangerous Conditions Known to Possessor
>
> A possessor of land is subject to liability for physical harm caused to licensees by a condition of the land if, but only if.
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees,

and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved. (Emphasis added.)

According to the majority's analysis, in order to make a determination that the City "willfully or maliciously failed to guard or warn" pursuant to Section 6 of the Recreation Act, which the majority did, the court must conclude that the City: (1) had knowledge of the dangerous condition of Devil's Pool; (2) should have realized that such condition involved an unreasonable risk of harm to the public, and (3) failed to exercise reasonable care to make the condition safe, or to warn the public. These elements are consistent with those in the majority's definition of willful misconduct, that being, "that the actor [affirmatively] desired to bring about the result that followed, or at least [knew that] it was substantially certain to follow." Majority opinion at 17 (citing Diaz v. Houck, 159 Pa. Commonwealth Ct. 274, 283-4, 632 A.2d 1081, 1085 (1993)). (Emphasis added.) However, the majority also states that "willful or malicious failure to guard or warn" is not synonymous with "willful misconduct" because the City did not possess the "desire to harm, kill, or maim". Majority opinion at 17. In making this conclusion, the majority disregards the

fact that a desire to harm is not necessarily required for conduct to rise to the level of willful misconduct. The definition of willful misconduct upon which the majority relies states that a s long as the actor knows that harm will most likely follow, the conduct is willful misconduct. In the present case, the evidence supports a conclusion that the City knew of the dangerous conditions of Devil's Pool, and knew that someone would most likely be injured as a result of their failure to guard or warn.

I disagree also because the majority' conclusion that suit against the City is not barred by Section 8542(a) of the Code implies a finding that the City's failure to guard or warn was a "negligent act". Although not defined in the Recreation Act, courts have consistently found the term willful to denote acts "done voluntarily or intentionally or knowingly, as distinguished from accidental." Jones v. Cheltenham Township, 117 Pa. Commonwealth Ct. 440, 444-45, 543 A.2d 1258, 1260 (1988) (citing Rosa v. United States, 613 F.Supp. 469, 476 (M.D. Pa. 1985)). Further, our Court has previously held that the phrase "negligent acts" in Section 8542 (a) (2) does not include a willful or malicious failure to act. See, Jones v. Cheltenham Township, 117 Pa Commonwealth Ct. 440, 543 A.2d 1258 (1988); Zlakowski v. Commonwealth, Department of Transportation, 154 Pa. Commonwealth Ct. 528, 624 A.2d 259

(1993). In addition, the portion of the majority's opinion which equates "willful or malicious failure to guard or warn" with the "willful or wanton injury" standard owing to gratuitous licensees does not support a conclusion that the City's acts were negligent.

> Negligence consists of inattentiveness or inadvertence, whereas wantonness exists where the danger to the Plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong.

Kasanovich v. George, 348 Pa. 199, 203, 34 A.2d 523, 525 (1943).

Based upon the above, I disagree with the majority's conclusion that Section 8542(a) of the Code does not bar suit because the City possessed no "intentional desire to harm, kill, or maim." Accordingly, I would reverse the decision of the trial court and grant the City's motion for judgment n.o.v.

BERNARD L. McGINLEY, Judge

Judge Doyle joins in this dissent.

Appendix C

APPENDIX C: OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED JULY 13, 1994.

IN THE COMMONWEALTH OF PENNSYLVANIA

MARGARET BARR, Administratrix of the Estate of David Barr, Deceased, a minor, and MARGARET BARR, in her own right	:	NO. 901 C.D. 1993
v.	:	Argued: January 31, 1994
CITY AND COUNTY OF PHILADELPHIA	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE CHARLES A. LORD. Senior Judge

OPINION BY JUDGE COLINS FILED: July 13, 1994

The City of Philadelphia (City) appeals a March 16, 1993 order of the Court of Common Pleas of Philadelphia County (Common Pleas) denying the City's motions for judgment n.o.v. and for a new trial (post-verdict motions). We reverse and remand.

On June 12, 1983, David Barr (decedent) drowned in what is

commonly known as Devil's Pool,[1] a natural body of water in the City's Fairmount Park. On June 6, 1985, Margaret Barr (administratrix), decedent's mother, filed suit against the City averring negligence and willful misconduct with respect to the City's maintenance of Devil's Pool.[2] On April 27, 1992, a jury determined that the City was 55% negligent and that the decedent was 45% negligent. The jury awarded $100,000.00 in the wrongful death action and $600,000.00 in the survival action; both amounts were molded by Common Pleas to reflect the comparative negligence of the parties. Additionally, the verdict was again molded to reflect the addition of delay damages in the amount of $275,915.79, for a total verdict of $660,915.79. The City's post verdict motions were subsequently denied. The instant appeal followed.

The City argues first, that pursuant to Section 3 of what is commonly known as the Recreational Use of Land and Water Act

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[1]Devil's Pool is formed by the confluence of the Cresheim and Wissahickon creeks and has shear rock cliffs on three sides.

[2]The City does not dispute the fact that it is the landowner and possessor of Devil's Pool.

(Recreation Act),[3] as landowner and possessor of Devil's Pool, it is immune from any claims of negligence arising from decedent's recreational use of the water. Hence, Common Pleas erred in permitting the jury to consider administratrix's negligence claims against the City and in denying the City's corresponding motion for judgment n.o.v. The City argues second, that Section 8542(a) of the Judicial Code (Code),[4] it is immune from any claims

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[3]Act of February 2, 1966, P.L. (1965) 1860, 68 P.S. Section 477-3, which provides:

> Except as specifically recognized or provided in section 6 of this act[, 68 P.S. Section 477-6], an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

[4]42 Pa. C.S. Section 8542(a) provides:

A local agency shall be liable for damages on account of an injury to a person of property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

> (1) The damages would be recoverable under common law or a statute creating a cause of

of willful misconduct arising from decedent's drowning. Hence, Common Pleas erred in permitting the jury to consider administratrix's willful misconduct claims against the City and in denying the City's motion for judgment n.o.v. The City argues third, that pursuant to Section 8542(b)(3) of the Code,[5] the real

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> action if the injury were caused by a person not having available a defense under Section 8546 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and
>
> (2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, 'negligent acts' shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

[5]42 Pa. C.S. Section 8542(b)(3) provides:

(b) Acts which may impose liability. The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:

property exception to governmental immunity, Common Pleas erred in refusing to charge the jury that the City could not be held liable if decedent were found to be a trespasser. Hence, Common Pleas erred in denying the City's motion for new trial. The City argues fourth, that Common Pleas erred in allowing administratrix to present allegedly prejudicial, irrelevant evidence or prior swimming accidents within Fairmount Park but not at Devil's Pool: In addition, Common

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...

(3) Real property. The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of he local agency. As used in this paragraph, 'real property' shall not include:
(i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
(ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;
(iii) streets; or
(iv) sidewalks.

Pleas compounded this error by denying the City's motion for a new trial.

Administratrix argues first, that pursuant to Section 6 of the Recreation Act, 68 P.S. Section 477-6,[6] and Section 342 of the Restatement (Second) of Torts (Section 342),[7] and because the City had

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[6]68 P.S. Section 477-6 provides:

> Nothing in this act limits in any way any liability which otherwise exists:
> (1) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.
> (2) For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for recreational use thereof, except that in the case of a land leased to the State or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of its [sic] section.

[7]Restatement (Second) of Torts Section 342 (1964) provides:

> Section 342. Dangerous Conditions Known to Trespassers
>
> A possessor of land is subject to liability for physical harm caused to licensees by a condition of the land, if, but only if,

extensive, prior knowledge of the obscure, dangerous conditions in Devil's Pool but failed to take any meaningful, curative measures with respect thereto, the City cannot be relieved of liability. The City willfully failed to warn or guard against the obscure, dangerous conditions within Devil's Pool. Under the circumstances, therefore, the City's conduct clearly fails within the purview of Section 342, and as such, the City's conduct invokes the willful or malicious failure to warn or guard exception of Section 6 of the Recreation Act. Administratrix argues second, that because she presented evidence at trial which clearly showed that the City had knowledge of dangerous activities in and around Devil's Pool and because decedent's death was caused in some manner by an unsafe, defective condition of the real estate itself, the Code's real property exception to governmental

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> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

immunity operates to impose tort liability on the City. Administratrix argues third, that because Fairmount Park is open to the public and because a trial court has

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wide latitude in charging a jury, Common Pleas did not err in refusing to charge the jury that the City could not be found liable if decedent were found to be a trespasser. Alternatively, pursuant to Section 336 of the Restatement (Second) of Torts,[8] even if decedent were found to be a trespasser, the City is liable. Therefore, the City's claim that under the circumstances, the Code's real property exception insulates it from liability with respect to trespassers ins erroneous. Administratrix argues fourth, that Common Pleas properly admitted evidence of prior swimming accidents near, albeit not at Devil's Pool, as this evidence was relevant to show that the City did, in fact, have

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[8]Restatement (Second) of Torts Section 336 (1964) provides:

Section 336. Activities Dangerous to Known Trespassers

A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety.

knowledge of similar dangerous conditions both in Devil's Pool and in other nearby natural bodies of water. This evidence was relevant to demonstrate the City's general awareness of the dangerous nature of the area's natural bodies of water and hence, is essential to establish exceptions to both the Recreation Act's and governmental immunity respectively.

The issues presented on appeal are: (1) considering that the Recreation Act provides for landowner immunity with respect to

negligence claims, whether Common Pleas erred by not granting the City's motion for judgment n.o.v.; (2) considering that the Code provides for governmental immunity as to willful misconduct claims, whether Common Pleas erred by not granting the City's motion for judgment n.o.v.; (3) because Common Pleas permitted the jury to hear and consider evidence of prior, allegedly unrelated drownings in other natural bodies of water near Devil's Pool, whether Common Pleas erred or abused its discretion by not granting the City's motion for a new trial.

The Court's "scope of review of a trial court's decision denying motions for judgment n.o.v. or for a new trial is limited to determining whether the trial court abused its discretion or committed an error of law." United Stated Fidelity & Guaranty Company v.

Appendix C

Royer Garden Center & Greenhouse, Inc., 143 Pa. Commonwealth Ct. 31, 40, 598 A.2d 583, 587 (1991), petition for allowance of appeal denied, 530 Pa. 663, 609 A.2d 170 (1992).

I. Applicability of the Recreation Act's Exception to Landowner Immunity

A. succinct analysis of the Recreation Act is imperative in reaching a determination of the aforementioned issues. The purpose of the Recreation Act is "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for

such purposes." Section 1 of the Recreation Act, 68 P.S. Section 477-1. Section 3 of the Recreation Act, 68 P.S. Section 477.3, provides that owners of recreational land do not owe a duty of care to keep their premises safe for recreational use by others, and Section 4 of the Recreation Act, 68 P.S. Section 477.4, provides that said owners do not incur liability for injury to such persons, unless the owners willfully or maliciously fail "to guard or warn against a dangerous condition, use, structure or activity." Section 6 of the Recreation Act, 68 P.S. Section 477-6.

The Pennsylvania Supreme Court has stated that the legislature intended to "limit applicability of the [Recreation Act] to outdoor

recreation on largely unimproved land...." Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 510 pa. 1, 16, 507 A.2d 1, 8 (1986), appeal after remand on other grounds, 398 Pa. Superior Ct. 264, 580 A.2d 1341 (1990), petition for allowance of appeal denied, 527 Pa. 623, 594 A.2d 659 (1991) The courts have extended immunity under the Recreation Act to public as well as private owners. Commonwealth v. Auresto, 511 Pa. 73, 511 A.2d 815 (1986) (immunity pursuant to the Recreation Act extends to the Commonwealth); Farley v. Township of Upper Darby, 100 Pa. Commonwealth Ct. 535, 514 A.2d 1023 (1986), petition for allowance of appeal denied, 517 Pa. 611, 536 A.2d 1334 (1987) (immunity pursuant to the Recreation Act extends to local government landowners). In addition, the Supreme Court has stated that it would be inconsistent with present public policy trends [ibid] to extend the Recreation Act to provide blanket immunity to all government

owned and operated recreational facilities. Walsh v. City of Philadelphia, 526 Pa. 227, 585 A.2d 445 (1991). Section 3 of the Recreation Act provides that a landowner is entitled to immunity when the landowner did not willfully or maliciously fail "to guard or warn against a dangerous condition, use, structure, or activity[]" on the land, when the landowner did not charge for the recreational use of

the land, or when the injured party entered the land for recreational purposes.

Initially, it must be determined whether Devil's Pool is the type of recreational facility which the legislature intended to fall within the scope of the Recreation Act. As the undeveloped, unimproved area in and around Devil's Pool is open to the public free of charge, and as this same area is used for a myriad of recreational purposes, such as fishing, hiking, picnicking, and swimming, the land in and around Devil's Pool certainly appears to fall within the purview of the Recreation Act.

Section 6 of the Recreation Act provides an exception to the immunity conferred in Section 3 of that act, but the exception applies only to the willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. With respect to the instant case, the question becomes whether the City willfully or maliciously failed to warn to guard against the dangerous condition, use, or structure of Devil's Pool.[9]

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The Pennsylvania Superior Court has held:

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[9]The record reveals that there is no dispute that the City had actual knowledge of the prior drownings and swimming accidents and that there were no signs posted indicating that swimming could be dangerous.

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> Although neither our Supreme Court nor this Court has interpreted [68 P.S.] Section 477-6, in Hahn v. Commonwealth, 18 Pa.D & C 3d 260 (1980), the court of common pleas equated the [68 P.S.] Section 477-6 standard of 'wilful and malicious' misconduct to the standard owing to gratuitous licensee is a person who is permitted, expressly or impliedly, to enter upon the land of another solely for the licensee's own accommodation, benefit, or convenience, and not for the owners's benefit or interest. Because the [Recreation] Act concerns situations analogous to that of the gratuitous licensee, that is, landowners permitting free access to their property to the public for the public's recreational pursuits and not for the benefit of the landowner, we agree with the Hahn court that the [Recreation] Act's 'wilful and malicious' standard represents a codification of the standard of care owing to a gratuitous licensee at common law...
>
> > In defining the wilful and wanton standard applicable in cases involving gratuitous licensees, Pennsylvania decisional law has relied on the Restatement (Second) of Torts provision regarding the duty owed to licensees....

Baran v. Pagnotti Enterprises, Inc., 402 Pa. Superior Ct. 298, 302-03, 586 A.2d 978, 980-81 (1991) (footnote omitted) (citations omitted). The Pagnotti court then quotes Section 342 of the Restatement (Second) of Torts, entitled "Dangerous Conditions Known to Possessor."[10]

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[10]See footnote 7, supra.

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In arguing that the willful or malicious failure to warn or guard exception of Section 6 of the Recreation Act applies, administratrix provided uncontradicted evidence that the City was

fully aware that Devil's Pool was a popular, public swimming hole, that there had been previous drownings and swimming accidents in Devil's Pool, that both immediately prior to and at the time of decedent's death there were no warning signs posted at Devil's Pool relating the danger of swimming therein, that the water in Devil's Pool was not clear, thereby preventing one from seeing far below the surface, that one could enter the water by climbing down rocks which projected outward beneath the water line,[11] and that the City did not have any type of lifesaving equipment on the premises. Further, administratrix presented expert testimony that reasonable, curative measures could have feasibly been taken, such as affixing permanent signs relating the danger of swimming therein, fencing off the area, or making regular, routine patrols of the area.

Finally, the United States District Court for the Eastern District of Pennsylvania has recently held that the exception to immunity conferred by the Recreation Act when a landowner's failure to guard

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[11]With respect to the rock configuration at Devil's Pool, see footnote 1, supra.

against a dangerous condition is willful involves two elements: (1) Actual knowledge of a danger, that is (2) not obvious to those entering the premises. Flohr v. Pennsylvania Power & Light Company, 821 F. Supp. 301 (E.D.Pa. 1993). Accordingly, with respect to the evidence which administratrix presented regarding both the City's knowledge of the dangers in and around Devil's Pool and the obscure, dangerous conditions thereabouts, the City's behavior was not prudent. The willful or malicious failure to

guard or warn exception of Section 6 of the Recreation Act, therefore, operates to impose liability upon the City in connection with decedent's death if administratrix is able to clear the obstacles presented by the Code's real property exception to governmental immunity.

II. Applicability of the Code's Real Estate Exception to Governmental Immunity

Initially, it must be noted that the immunity provisions set forth in the Recreation Act generally must be read in pari materia with the immunity provision set forth in the Code. Auresto. With respect to whether the real property exception operates to impose liability on the City and with respect to administratrix's willful failure to warn or

guard averments, the Pennsylvania Supreme Court has held:

> that the real estate exception [to governmental immunity] can be applied only to those cases where it is alleged that the artificial condition of defect of the land itself causes the injury, not merely when it facilitates the injury by the acts of others, whose acts are outside the statute's scope of liability.

Mascaro v. Youth Study Center, 514 Pa. 351, 363, 523 A.2d 1118, 1124 (1987). In addition, this Court has held that

> Mascaro and the subsequent line of cases interpreting it are clear that the injury must result from a defect in the real property itself, that the defect must be the direct cause of the injury, and that intervening acts serve to render the real property exception inapplicable....

Downing v. Philadelphia Housing Authority, 148 Pa. Commonwealth Ct. 225, 232, 610 A.2d 535, 538, petition for allowance of appeal

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denied, 532 Pa. 658, 615 A.2d 1314 (1992). "[T]he burden [is] on [administratrix] to prove that the real estate itself was defective and that the real estate's defect caused the injuries, not merely the negligence of the City employees." Mitchell v. City of Philadelphia, 141 Pa. Commonwealth Ct. 695, 701, 596 A.2d 1205, 1208 (1991).

Administratrix has argued both in her brief and vigorously at oral argument, that the obscure, dangerous defects within Devil's Pool itself directly caused decedent's death. There is no evidence of record, however, of any specific defect which caused decedent's

drowning except for the direct testimony of Philadelphia police officer David Gallus.[12] Officer Gallus testified that one could directly enter the water by climbing down rocks, the desired inference being that there were rocks projecting outward beneath the water line. Thus Court notes that the administratrix also introduced the testimony of two other experts at trial: Carl A. Silver, Ph. D. (Dr. Silver), a professor of human engineering and statistics at Drexel University, and William Logue (Coach Logue), an aquatic consultant and former men's and women's swimming and diving coach at Drexel University. Dr. Silver testified during cross-examination that he could only speculate as to whether decedent was injured by any obstacle in Devil's Pool. Similarly, Coach Logue testified during cross-examination that he could only speculate as to what may have caused decedent to drown in Devil's

Pool.[13]

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[12]AT the time of decedent's death, Officer Gallus held the rank of police diver; Officer Gallus recovered decedent's body from Devil's Pool.

[13]Mr. Logue opined that several factors may have contributed to decedent's drowning: rapid change in the depth of the water; disorientation with respect to the surface due to the murkiness of the water; and sudden change in body temperature

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In addition, there was no evidence of trauma introduced at trial. Officer Gallus further testified that when he recovered decedent's body from Devil's Pool, he did not observe any evidence of trauma to the body. Moreover, the medical evidence indicated death by drowning. The Medical Examiner's report (report) was admitted into evidence as plaintiff's exhibit No. P-17. The "REPORT OF DEATH" section of the report provides the following: "Decedent was in [the] Park drinking, he jump [sic] from a bridge into [Devil's Pool], decedent drowned, no apparent trauma." In the "POSTMORTEM REPORT" section, under "PATHOLOGICAL DIAGNOSIS," the report states that decedent was suffering from the effects of ethanolism;[14] under "EXTERNAL EVIDENCE OF INJURY," the report states that there was no apparent trauma except for extremely superficial abrasions of the lips, eyelids, and nose; under "INTERNAL EXAMINATION," the report states that "[c]raniocerebral or myelocervical injuries are not present.: Finally, in the "REPORT OF TOXICOLOGIST" section, the report indicates that the decedent had been drinking and had a stomach alcohol content of 0.62%, a blood alcohol content of 0.09%, and a urine alcohol content of 0.11%.

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because of the frigid temperature of Devil's Pool.

[14]Ethanolism indicates an ethanol induced abnormally diminished content of glucose in the blood.

While administratrix vigorously argues causation issues in her brief, the causation issue was never raised by the City, the burdened party, on appeal to this Court. Specifically, the City did not raise the issue of whether the real estate was defective or whether there was a lack of evidence that such defects caused decedent's drowning. This Court cannot raise these issues sua sponte. We must limit ourselves to the issues preserved in the City's brief. Pa. R.A.P. 2116.[15]

The City contends, with regard to governmental immunity, that if this Court concludes (as we have) that the willful or malicious failure to warn or guard exception of Section 6 of the Recreation Act removes the Recreation Act's bar to suit, the administratrix cannot recover, because the real estate exception to governmental immunity provides that a governmental entity cannot be held responsible for willful misconduct. In essence, the City would have us declare that "willful or malicious failure to warn to guard" is synonymous with "willful

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[15]Pa. R.A.P. 2116 provides, in pertinent part:

> The statement of the questions involved must state the question or questions in the briefest and most general terms.... [N]o point will be considered which is not set forth in the statement of questions involved or suggested thereby.

misconduct." We cannot so hold. Willful denotes an act of commission, requiring proof "that the actor [affirmatively] desired to bring about the result that followed, or at least [knew that] it was substantially certain to follow." Diaz v. Houck, 159 Pa. Commonwealth Ct. 274, __, 632

A.2d 1081, 1085 (1993). On the other hand, a willful failure to guard or warn denotes an actor's failure to act or an intentional omission rather than an actor's intentional desire to harm, kill, or maim.

Accordingly, we hold that Common Pleas did not err in the treatment of these issues or in its refusal to grant judgment n.o.v. based upon the Recreation Actor the Code.

III. Propriety of Common Pleas' Refusal to Give Trespass Charge

"'So long as the trial court properly covers the law on the issues raised in the case, [the trial judge] is given wide latitude in charging the jury.'" City of Philadelphia v. Duda, 141 Pa. Commonwealth Ct. 88, 99, 595 A.2d 206, 211 (1991), petition for allowance of appeal denied, 532 Pa. 658, 615 A.2d 1314 (1992) (quoting Sheehan v. Cincinnati Shaper Company, 382 Pa. Superior Ct. 579, 586, 555 A.2d 1352, 1356, petition for allowance of appeal denied, 523 Pa. 633, 564 A.2d 1261 (1989)). In addition, this Court has held that in reviewing

jury instructions "[a] review of the entire charge is necessary to determine whether the trial court erred." Eckert v. Querry, 158 Pa. Commonwealth Ct. 421, 426, 632 A.2d 9, 11 (1993). Further, "[a] court's charge to the jury will be upheld if it adequately and accurately reflects the law and was sufficient to guide the jury in its deliberation.'" Brill v. Systems Resources, Inc., 405 Pa. Superior Ct. 603, 606, 592 A.2d 1377, 1378 (1991) (quoting Commonwealth v. Person, 345 Pa. Superior Ct. 341, 345, 498 A.2d 432, 434 (1985)).

Devil's Pool is within the confines of Fairmount Park, one of

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the largest public municipal parks in the country. The record reveals no evidence that decedent intentionally trespassed. Moreover, all of the evidence presented shows that at the time of decedent's death there were no signs or warnings relating the danger of swimming in Devil's Pool or indicating that it was off limits to the public. The park is a public recreation area frequented every year by thousands of citizens who engage in a myriad of recreational activities.

The City has admitted that there were no warning signs or trespass notices present at Devil's Pool at the time of decedent's drowning. It follows ipse dixit that decedent could not have been found to have been a trespasser based upon the evidence presented to the jury. Therefore, this Court holds that Common Pleas did not err in refusing

to charge the jury on trespassing, because there was no evidence that decedent trespassed; Common Pleas' charge adequately and accurately reflected the pertinent law.

IV. Admissibility of Evidence Regarding Prior Swimming Accidents Near Devil's Pool

"The fundamental consideration in determining the admissibility of evidence is whether that evidence is relevant to the fact sought to be proved." Starr v. Department of Environmental Resources, 147 Pa. Commonwealth Ct. 196, 203, 607 A.2d 321, 324 (1992). "Evidence is relevant if it tends to establish facts in issue." Monaci v. Workmen's Compensation Appeal Board (Ward Trucking), 116 Pa. Commonwealth Ct. 172, 175, 541 A.2d 60, 62 (1988). "However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair

prejudice or confusion. Prejudice refers to an undue tendency to suggest a decision on an improper basis and does not refer to merely being detrimental to one party's case." Morrison v. Commonwealth, 148 Pa. Commonwealth Ct. 245, 252-53, 610 A.2d 1082, 1086 (1992), petition for allowance of appeal granted, __ Pa. __, 629 A.2d 1385 (1993) (citation omitted.) Generally, remoteness of evidence in determinable by distance as well as time. Finnerty v. Darby, 391 Pa.

300, 138 A.2d 117 (1958). If the other nearby natural bodies of water where similar accidents occurred are so remote in space/distance from Devil's Pool that they are without probative value, then such evidence will be excluded on the independent ground of irrelevancy. See Commonwealth v. Scott, 496 Pa. 78, 436 A.2d 161 (1981); Gibson v. Department of Public Welfare, 35 Pa. Commonwealth Ct. 27, 384 A.2d. 1030 (1978).

This Court holds that Common Pleas erred, when it admitted evidence of prior swimming accidents that did not occur at Devil's Pool, because there was no evidence to demonstrate that the attending circumstances and conditions were similar to those at Devil's Pool when decedent drowned. Moreover, the physical remoteness between the other natural bodies of water where prior swimming accidents occurred and Devil's Pool where the decedent's drowning occurred substantially diminishes any probative value of demonstrating analogous conditions and circumstances. See Commonwealth v. Clark, 280 Pa. Superior Ct. 1, 421 A.2d 374 (1980), affirmed, 501 Pa. 393, 461 A.2d 794 (1983).

This Court acknowledges that the decision "[w]hether to grant

a motion for a new trial is within the discretion of the trial court and its decision will not be reversed in the absence of a manifest abuse of

discretion or a clear error of law." Bucks County Water v. 9,180 Feet of Land, 147 Ps. Commonwealth Ct. 612, 617-18, 608 A.2d 1109, 1112 (1992). In conjunction therewith, "some improperly admitted evidence may be so prejudicial that a new trial is required." Scranton Penn Furniture Company v. City of Scranton, 92 Pa. Commonwealth Ct. 45, 52, 498 A.2d 469, 473 (1985). This Court agrees with the City that a new trial should be granted, because evidence of prior, unrelated drownings and swimming accidents near to but not at Devil's Pool cannot provide probative evidence regarding the cause of decedent's death at Devil's Pool, and such evidence regarding the cause of decedent's death at Devil's Pool, and such evidence was highly inflammatory.

Accordingly, we reverse Common Pleas on its determination that evidence prior, unrelated swimming accidents was admissible; we affirm Common Pleas in all other respects, and we remand for a new trial consistent with this opinion.

JAMES GARDNER COLINS, Judge

Appendix D

APPENDIX D: JUDGE ALFRED J. DiBONA, JR.'S OPINION FROM THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, PENNSYLVANIA, DATED JUNE 8, 1993.

MARGARET BARR, ADMINISTRATRIX OF THE ESTATE OF DAVID BARR, DECEASED, A MINOR, AND MARGARET BARR, IN HER OWN RIGHT	: COURT OF COMMON PLEAS : PHILADELPHIA COUNTY : JUNE TERM, 1985
vs.	
CITY OF PHILADELPHIA	: NO. 2001

OPINION

DI BONA, J. DATE: JUNE 8, 1993

This is an appeal taken by the defendant, City of Philadelphia, from this Court's Orders of March 16, 1993, which denied the defendant's post verdict motion and granted the plaintiff's petition for delay damages.

Plaintiff filed suit against the defendant in 1985 asserting claims of negligence and wilful misconduct arising out of the death of plaintiff's decedent by drowning on June 12, 1983. the incident occurred in an area of Fairmount Park in Philadelphia known as Devil's Pool. On April 27, 1992, the jury rendered a verdict which found that the

negligent conduct of the City was a substantial factor in bringing about plaintiff's harm and assessed comparative negligence 55% against the defendant City of Philadelphia and 45% against the plaintiff's decedent. The jury awarded $100,000.00 in the wrongful death action and $600,000.00 in the survival action which amounts were molded by the Court to reflect the comparative negligence of the parties. This molded verdict was again molded to reflect the addition of delay damages

in the amount of $275,915.79 for a total verdict of $660,915.79. The defendant's post verdict motions in the nature of motions for judgment n.o.v. and motions for a new trial were subsequently denied for the reasons hereinafter set forth.

The defendant contends that this Court erred in not granting the defendant's motion for judgment n.o.v. since the Recreation Use of Land and Water Act, 68 P.S. Section 477-1 to 477-8 bars the plaintiff's negligence claims by granting immunity to the City of Philadelphia. The Recreation Use of Land and Water Act provides in relevant part as follows:

> Section 477-4.
>
> Except as specifically recognized by or provided in section 6 of this act, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

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(1) Extend any assurance that the premises are safe for any purpose.

(2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(3) Assume responsibility for or incur liability for any injury to persons or property caused by an act of omission of such persons.

Section 477-3.

Except as specifically recognized or provided in section 6 of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

Section 477-6.

Nothing in this act limits in any way any liability which otherwise exists:

(1) For wilful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

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The provisions of this statute and the applicability thereof to cases involving wilful or malicious failure to warn of a known danger were thoroughly reviewed in the case of Baran v. Pagnotti Enterprises, Inc., __Pa.Super.___, 586 A.2d 978 (1991). In that case the Superior Court held:

"Pagnotti raises the Recreation Use of Land and Water Act, 68 P.S. Section 477-1 et seq., as a defense to its liability. The Act relieves landowners of the duty to keep the premises safe or to warn of dangerous conditions, uses, structures or activities thereon. 68 P.S. Section 477-3. Likewise, those landowners who by some means invite or permit others to use their property for recreational purposes extend no assurances that the premises are safe, assume no duty of care toward recreational users, and incur no liability for negligent immunity is subject to two exceptions: an owner is not insulated from liability if the owner charges a fee to persons who enter the land for recreational purposes, 68 P.S. Section 477-6; nor does the Act relieve the owner of liability for wilful or malicious failure to warn or guard against a dangerous condition, use, structure or activity."

....

"Although neither our Supreme Court nor this Court has interpreted Section 477-6, in Hahn v. Commonwealth, 18 Pa.D & C d 260 (1980), the court of common pleas equated the Section 477-6 standard of 'wilful and malicious' misconduct to the standard owing to gratuitous licensees at common law, that is, liability for wilful or wanton injury. See also Livingston By Livingston v. Penna. Power and Light Co., 609 F.Supp. 643 (1985), aff'd. 782 F.2d 1029 (3d. Cir. 1986). A gratuitous licensee is a person who is permitted, expressly or impliedly, to enter upon the land of another solely for the licensee's own accommodation, benefit, or convenience, and not for the owner's benefit or interest. Sharp v. Luksa, 440 Pa. 125,269 A.2d 659, 660 (1970); Potter Title & Trust Co. v. Young, 367 Pa. 239, 80 A.2d 76, 78 (1951). Oswald v. Hausman, 378 Pa.Super. 245,548 A.2d 594, 598 (1988); 27 P.L.E. Negligence Section 42. Because the Act concerns situations analogous to that of the gratuitous licensee, that is, landowners permitting free access to their property to the

public for the public's recreational pursuits and not for the benefit of the landowner, we agree with the Hahn

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court that the act's 'wilful and malicious' standard represents a codification of the standard of care owing to a gratuitous licensee at common law.

In defining the wilful and wanton standard applicable in cases involving gratuitous licensees, Pennsylvania decisional law has relied on the Restatement (Second) of Torts provision regarding the duty owed to licensees:

Section 342. Dangerous Conditions Known to Possessor

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved.

See Sharp v. Luksa, supra, quoting Restatement (Second) of Torts Section 342; Kopp v. R.S. Noonan, Inc., 385 Pa. 460, 123 A.2d 429, 431 (1956); Ott v. Unclaimed Freight Co., 395 Pa.Super. 483, 577 A.2d 894 (1990); Fisher v. Findlay, 319 Pa.Super. 214, 465 A.2d 1306 (1983)."

586 A.2d 978 at 979, 980-91.

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The evidence presented by the plaintiff clearly indicated that the defendant had knowledge and notice of the dangerous condition of Devil's Pool. This conduct clearly fell within the definitions of Section 342 of the Restatement, supra, and eliminated the immunity available to the City of Philadelphia. For these reasons, the defendant's motion for a directed verdict and motions for judgment n.o.v. were denied.

Next, the defendant contends that this Court erred in not granting the defendant's motion for judgment n.o.v. since the Political Subdivision Tort Claims Act, 42 Pa. C.S. Section 8541 & c.,

provides immunity to the defendant. The exceptions to the immunity provisions of the Act were recently reviewed in Mitchell v. City of Philadelphia, __ Pa.Cmwlth.____, 596 A.2d 1205 (1991) as follows:

> "As previously noted, actions in tort against municipalities are governed by the Tort Claims Act. There are two requirements which must be met in order to successfully maintain an action against a political subdivision. First, as a precondition, there must be a cause of action which would allow the recovery of damages, at common law, against a tort-feasor not otherwise shielded by governmental immunity. Secondly, the cause of the injury must fit into one of the eight enumerated exceptions set forth in Section 8542(b) of the Tort Claims Act. Mascaro v. Youth Study Center, 514 Pa. 351, 523 A.2d 1118 (1987)."

596 A.2d 1205 at 1207.

A review of the record reveals that plaintiff has satisfied both

requirements. Plaintiff clearly had a cause of action at common law under Section 343 of the Restatement of Torts. In addition, plaintiff proved that the real estate exception (42 Pa. C.S. Section 8542(b)(3)) applied since the plaintiff proved that the real estate in possession of the defendant was defective and in part caused his death. Plaintiff met the burden of showing that the decedent's injury was caused in some manner by the unsafe condition of the defendant's real estate. For these reasons, the defendant's motion for judgment n.o.v. was denied.

The defendant also contends that this Court erred in refusing to instruct the jury per defendant's requested point for charge No. 16. This point sought an instruction based upon 42 Pa. C.S. Section 8542(b)(3) that plaintiff would be precluded from recovery if the jury found that plaintiff's decedent was a trespasser. 42 Pa. C.S. 8542(b)(3) provides that:

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> "The local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency."

The status of a plaintiff as a trespasser under this statute was reviewed in Frank v. Southeastern Pennsylvania Transportation Authority, __Pa.Cmwlth.___, 506 A.2d 1015 (1986). In that case it was held that a trespasser is a person who enters upon land or property to which the public is not invited. The evidence clearly shows that plaintiff's decedent was permissibly invited to use all areas

of Fairmount Park. Devil's Pool was open and accessible to the public and was known to the defendant to be an area where the public fished and swam. There are no facts in evidence which would portray or classify the plaintiff's decedent as a trespasser. Therefore, the defendant's request for an instruction on this issue was denied. In City of Philadelphia v. Duda by Duda, __Pa.Cmwlth.___, 595 A.2d 206 (1991) the Commonwealth Court held that:

> "'So long as the trial court properly covers the law on the issues raised in the case, [the trial court] is given wide latitude in charging the jury.' Sheehan v. Cincinnati Shaper Co., 382 Pa.Superior Ct. 579,586, 555 A.2d 1352, 1356, *appeal denied*, 523 Pa. 633, 564 A.2d 1261 (1989). As the Superior Court observed in Werner v. Quality Service Oil Co., Inc., 337 Pa.Superior Ct. 264, 269, 486 A.2d 1009, 1011 (1984), '[t]he refusal to give a proper instruction requested by a party is ground for a new trial only if the substance thereof has not otherwise been covered by the trial court's general charge.'
>
> Furthermore, the suggested standard jury instructions are not binding, even where a party requests a trial judge specifically to use them. 'These instructions are guides only and the trial judge is free to deviate from them or ignore them entirely. What is important is whether the charge as a whole provides a sufficient and correct legal basis to guide a jury in its
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>
> deliberations.' Mackowick v. Westinghouse Electric Corp., 373 Pa.Superior Ct. 434, 441, 541 A.2d 749, 752 (1988) (en banc), *affirmed*, 525 Pa. 52, 575 A.2d 100 (1990)."

595 A.2d 206 at 211-212.

The charge of this Court, reviewed in its entirety, reveals that the jury was provided with a correct legal basis to guide its deliberations. The refusal to charge on the plaintiff's decedent's status as a trespasser was not error under the evidence submitted and does not constitute grounds for a new trial.

Finally, the defendant contends that this Court erred in permitting evidence of prior drowning accidents in Fairmount Park to be disclosed to the jury. In Whitman v. Riddell, __Pa.Super.___, 471 A.2d 521 (1984) the Superior Court reviewed appellate cases focusing on the issue of the admissibility of prior accidents and held:

> "In certain circumstances 'evidence of similar accidents occurring at *substantially the same place and under the same or similar circumstances* may, in the sound discretion of the trial Judge, be admissible to prove constructive notice of a defective or dangerous condition and the likelihood of injury.' Stormer v. Alberts Construction Co., 401 Pa. 461, 466, 165 A.2d 87, 98 (1960) (emphasis in original). Such evidence will be permitted 'for the purpose of establishing the character of the place where [the accidents] occurred, their cause, and the imputation of notice, constructive at least, to the proprietors of the establishment, of the defect and the likelihood of injury." Yoffee v. Pennsylvania Power and Light Co., 385 Pa. 520, 542, 123 A.2d 636, 648-49 (1956), quoting Ringleheim v. Fidelity Trust Co., 330 Pa. 69, 71, 198 A.2d 628, 629 (1938). This limited exception, permitting the introduction of evidence of similar accidents, is tempered by judicial concern that the evidence may raise collateral issues, confusing both the real issue and the jury. Stormer vs. Alberts Construction Co., supra, 401 Pa. at 466, 165 A.2d at 89."

471 A.2d 521 at 523.

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Inasmuch as plaintiff's suit asserted claims under the Recreation Use of Land and Water Act and under the Political Subdivision Tort Claims Act, plaintiff was required to establish notice to defendant and knowledge of the defendant of the dangerous uses, activities and conditions of the area of the accident. This Court found that the prior accidents submitted by the plaintiff occurred at "substantially the same place" and under similar circumstances" to the Barr drowning. These other accidents established the character of the place where the accident occurred and imputed notice to the defendant of the dangerous conditions and defects in the pools/ponds of the area which created the likelihood of injury. The admission of these three prior accidents did not raise collateral issues and did not tend to confuse or mislead the jury. For these reasons, the admission of the evidence of prior accidents did not constitute error and defendant's motion for new trial was denied.

For all of the foregoing reasons, the defendant's post verdict motions in the nature of a motion for judgment n.o.v. and motions for a new trial were denied. The verdict as molded to include delay damages should stand accordingly.

ALFRED J. DI BONA, JR.
J.

Appendix E

APPENDIX E: RECREATIONAL USE OF LAND AND WATER ACT.

68 P.S. Section 477-1:

> Purpose; liability
> The purpose of this act is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

68 P.S. Section 477-2:

Definitions

As used in this act:

(1) **"Land"** means land, roads, water, watercourses, private ways an buildings, structures and machinery or equipment when attached to the realty.

(2) **"Owner"** means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.

(3) **"Recreational purpose"** includes, cut is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure diving, nature study, water skiing, water sports, cave exploration and viewing or enjoying historical, archaeological, scenic, or scientific sites.

(4) **"Charge"** means the admission price or fee asked in return for invitation or permission to enter or go upon the land.

1966, Feb. 2, P.L. (1965) 1860, Section 2. Amended 1992, March 26, P.L. No. 10, Section 1, effective in 60 days.

Section 477-3. Duty to keep premises safe; warning

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Except as specifically recognized or provided in section 6 of this act, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.
1966, Feb. 2, P.L. (1965) 1860, Section 3.

Section 477-4. Assurance of safe premises: duty of care; responsibility, liability

Except as specifically recognized by or provided in section 6 of this act, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

(1) Extend any assurance that the premises are safe for any purpose.

(2) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(3) Assume responsibility for or incur liability for nay injury to persons or property caused by an act of omission of such persons.
1966, Feb. 2, P.L. (1965) 1860, Section 4.

Section 477-5. Land leased to State or subdivision

Unless otherwise agreed in writing, the provisions of sections 3 and 4 of this act shall be deemed applicable to the duties and liability of an owner of land leased to the State or any subdivision thereof for recreational purposes.
1966, Feb. 2, P.L. (1965) 1860, Section 5

68 P.S. Section 477-6:

Liability not limited
Nothing in this act limits in any way any liability which

otherwise exists:

(1) For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(2) For injury suffered in any case where the owner of land charges the person or person who enter or go on the land for the recreational use thereof, except that in the case of land leased to the State or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section.

Section 477-7. Construction of act

Nothing in this act shall be construed to:

(1) Create a duty of care or ground of liability for injury to persons or property.

(2) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this act to exercise case in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care.

1966, Feb. 2, P.L. (1965) 1860, Section 7.

Section 477-8. Repealer

The act of September 27, 1961 (P.L. 1696), entitled *** [section 1629 of Title 12], is repealed.

All other acts or parts of acts are repealed in so far as inconsistent herewith.

1966, Feb. 2, P.L. (1965) 1860, Section 8.

APPENDIX F: THE POLITICAL SUBDIVISION TORT CLAIMS ACT.

42 Pa.C.S.A. Section 8541

Governmental immunity generally

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

42 Pa.C.S.A. Section 8542

Exceptions to governmental immunity

(a) Liability imposed. - A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

> (1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and
>
> (2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitute a crime, actual fraud, actual malice or willful misconduct.

(b) Acts which may impose liability. - The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:

(1) *Vehicle liability.*__The operation of nay motor vehicle in the possession or control of the local agency. As used in the possession or control of the local agency. As used in this paragraph, "motor vehicle" means any vehicle which is self-propelled an any attachment thereto, including vehicles operated by rail, through water or in the air.

(2) *Care, custody or control of personal property.*__The care, custody or control of personal property of others in the possession or control of the local agency. The only losses for which damages shall be recoverable under this paragraph are those property losses suffered with respect to the personal property in the possession or control of the local agency.

(3) *Real property.* - The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency. A used in this paragraph, "real property" shall not include [ibid]:

(i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
(ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;
(iii) streets; or
(iv) sidewalks.

(4) *Trees, traffic controls and street lighting.*__A dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting systems under the care, custody or control of the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk to the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the

circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

(5) *Utility service facilities.*__A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way, except that the claimant to recover must establish that the dangerous condition created a reasonable foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

(6) *Streets.*__

(i) A dangerous condition of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances o the dangerous condition at a sufficient tine prior to the even to have taken measures to protect against the dangerous condition.

(ii) A dangerous condition of streets owned or under the jurisdiction of Commonwealth agencies, if all of the following conditions are met:

(A) The local agency has entered into a written contract with a Commonwealth agency for the maintenance and repair by the local agency of such streets and the contract either:

(i) had not expired or been otherwise terminated prior to the occurrence of the injury; or
(ii) if expired contained a provision that expressly established local agency responsibility beyond the term of the contract for injuries arising out of the local agency's work.

(B) The injury and dangerous condition were directly caused by the negligent performance of its duties under such contract.

(C) The claimant must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous conditions a sufficient time prior to the even to have taken measures to protect against the dangerous condition.

(7) *Sidewalks.*__A dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency, except the that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the even to have taken measures to protect against the dangerous condition. When a local agency is

liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.

(8) *Care, custody or control of animals.*__The care, custody or control of animals in the possession or control of a local agency, including but not limited to police dogs and horses. Damages shall not be recoverable under this paragraph on account of any injury caused by wild animals, including but not limited to bears and deer, except as otherwise provided by statute.

(c) **Limited definition.**__As used in this section the amount of time reasonably required to take protective measures, including inspections required by law, shall be determined with reference to the actual equipment, personnel and facilities available to the local agency and the competing demand therefore.

Appendix G

APPENDIX G: PROOF OF SERVICE.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased, Administratrix of the Estate of DAVID BARR, Deceased, a minor, and LINDA LORY, Administratrix of the Estate of MARGARET BARR, Deceased

Petitioner

vs.

CITY OF PHILADELPHIA

Respondent

PROOF OF SERVICE

I, Philip J. Berg, Esquire hereby certify that copies of the foregoing Petition for a Writ of Certiorari were forwarded to the following persons, with first-class postage prepaid, by depositing the same in a United State post office or mailbox this 16th day of July, 1996, that said service is in accordance with Rule 28 of this court and that the persons listed constitute all parties required to be served:

Alan C. Ostrow, Assistant City Solicitor
Attorney for Respondent
City of Philadelphia

Appendix G

Law Department
1600 Arch Street, 10th Floor
Philadelphia, PA 19103-2081

Prothonotary
The Supreme Court of Pennsylvania
Room 468, City Hall
Philadelphia, PA 19107

Thomas W. Corbett, Jr.
Attorney General of Pennsylvania
Office of the Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

By: _____
Philip J. Berg, Esquire
Attorney for Petitioner